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Supreme Court, U.S.
FILED

No. 97-590

OCT - 2 1997

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DAVID R. KNAPP and GRK CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, pursuant to United States v. Gaudin 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), in a criminal prosecution for filing a false currency transaction report with the Internal Revenue Service, the trial court plainly and prejudicially erred pursuant to Johnson v. United States No. 96-203, ___ U.S. ___, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) by failing to submit the disputed question of "materiality" of the false statements to the jury?

2. Whether, pursuant to Cheek v. United States 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991), in a criminal prosecution for filing a false currency transaction report with the Internal Revenue Service, the trial court plainly and prejudicially erred pursuant to Johnson v. United States No. 96-203, ___ U.S. ___, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) by instructing the jury that the disputed question of "willfulness" may be proved if defendant acted with a bad purpose or evil motive?

3. Whether, pursuant to Ingram v. United States 360 U.S. 672, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959) in a criminal prosecution for conspiracy to money launder, the trial court plainly and prejudicially erred pursuant to Johnson v. United States No. 96-203, __ U.S. __, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) by failing to submit to the jury the disputed question of defendant's knowledge of an unlawful object of the conspiracy?

4. Whether, in a criminal prosecution for money laundering, the asserted erroneous instructions pertaining to conspiracy to money launder and money laundering constituted plain and prejudicial error pursuant to Johnson v. United States No. 96-203, ___ U.S. ___, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) by authorizing the jury to find

money laundering without proof of knowledge or intent to money launder?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

PROVISIONS OF LAW INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION AND ISSUING A WRIT OF CERTIORARI 8

1. INTRODUCTION 8

2. THE JURY INSTRUCTIONS PERTAINING TO A VIOLATION OF 26 U.S.C. §§7206(1) AND (2) . . . 12

3. THE JURY INSTRUCTIONS PERTAINING TO CONSPIRACY TO MONEY LAUNDER 14

4. THE JURY INSTRUCTIONS PERTAINING TO MONEY LAUNDERING 16

TABLE - CON'T

5. PLAIN ERROR SHOULD BE NOTED WHEN THE ERROR PERTAINS TO INSTRUCTIONS GIVEN TO THE JURY CONCERNING ELEMENTS OF THE CRIME WHICH ARE CONTESTED AT TRIAL 19

CONCLUSION 22

APPENDIX . . . . . A

ORDER AND OPINION (Filed 07/15/97)

MEMORANDUM (Filed 04/05/95)

ORDER (Filed 08/22/97)

PROOF OF SERVICE

TABLE OF AUTHORITIES

Cases — Page

Cheek v. United States 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) 13

Frances v. Franklin 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) 13, 18, 21

Ingram v. United States 360 U.S. 672, 795 S.Ct. 1314, 3 L.Ed.2d 1503 (1959) 15

Johnson v. United States ___ U.S. ___, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) 9, 10 11, 12

Knapp v. United States ___ U.S. ___, 116 S.Ct. 666, 133 L.Ed.2d 517 (1995) 1, 8

Pope v. Illinois 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987) 19, 20

Rogers v. United States No. 96-1279 11

Rose v. Clark 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) 19, 20, 21

Cases **Page**

Sullivan v. Louisiana 508 U.S. 275,
113 S.Ct. 2078, 124 L.Ed.2d
182 (1993) 16, 19, 20

United States v. Barone 114 F.3d 1284
(1st Cir., 1997) 17

United States v. Baumgardner 85 F.3d 1305
(8th Cir., 1996) 17

United Brotherhood of Carpenters and
Joiners of America v. United States
330 U.S 395, 67 S.Ct. 775,
91 L.Ed. 973 (1947) 10, 16

United States v. Bordeaux No. 96-3968,
1997 U.S. App. Lexis 21547
(8th Cir., 1997) 10

United States v. Calverley 37 F.3d 160
(5th Cir., 1994), cert. denied,
115 S.Ct. 1266 (1995) 17

United States v. David 83 F.3d 638
(4th Cir., 1996) 17

United States v. Dupaquier 74 F.3d 615
(5th Cir., 1996) 17

United States v. Gaudin, 515 U.S. 506,
115 S.Ct. 2310, 132 L.Ed.2d 444,
(1995) 8, 9, 12, 16, 19

Cases **Page**

United States v. Gaudin (9th Cir., 1994) 28 F.3d 943 12

United States v. Hegwood 977 F.2d 492 (9th Cir., 1992) 15

United States v. Kramer 73 F.3d 1067 (11th Cir., 1996) 17

United States v. Krasovich 819 F.2d 253 (9th Cir., 1987) 15

United States v. McMillan 1997 U.S. App. Lexis 18857 (10th Cir., 1997) 10, 17

United States v. Olano 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) 11

United States v. Retos 25 F.3d 1220 (3rd Cir., 1994) 17

United States v. Ripinski 109 F.3d 1436 (9th Cir., 1997) 16

United States v. Rogers 118 F.3d 466, 1997 U.S. App. Lexis 16238 (6th Cir., 1997) 10

United States v. Ross 77 F.3d 1525 (7th Cir., 1996) 17

Cases **Page**

United States v. Stein 37 F.3d 1407 (9th Cir., 1994) cert. denied, 513 U.S. 1181, 115 S.Ct. 1170, 130 L.Ed.2d 1124 (1995) 16, 17, 18

United States v. Turman No. 94-50305, 97 Daily Journal D.A.R. 11853 . . . . . 16, 17

United States v. Viola 35 F.3d 37 (2nd Cir., 1994) cert denied, 115 S.Ct. 1270 (1995) 17

United States v. Washington 12 F.3d 1128 (D.C. Cir., 1994) cert. denied, 115 S.Ct. 98 (1994) 17

United States v. Webster 84 F.3d 1056 (8th Cir., 1996) 17

Statutes, Codes and Rules **Page**

18 U.S.C., Federal Rules of Criminal Procedure, Rule 52 3

18 U.S.C., Federal Rules of Criminal Procedure, Rule 52(a) 11

18 U.S.C., Federal Rules of Criminal Procedure, Rule 52(b) 9, 10

18 U.S.C. §371 4

Statutes, Codes and RulesPage

18 U.S.C. §1956(a)(1)(B)(i) 2, 4

26 U.S.C. §6050I(f)(1)(B) 4

26 U.S.C. §7206(1) 2, 4, 12

26 U.S.C. §7206(2) 4, 12

28 U.S.C. §1254(1) 1

Supreme Court Rule 12.4 3

Supreme Court Rule 13.1 1

Supreme Court Rule 13.3 1

United States Constitution **Page**

Amendment V 1

Amendment VI 2

PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT:

The petitioners, DAVID R. KNAPP and GRK CORPORATION, respectfully pray that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 15, 1997.

OPINIONS BELOW

On July 15, 1997, the Court of Appeals affirmed defendants' federal criminal convictions in a published opinion (App. A, *infra.*) following this Court's grant of certiorari in Knapp v. United States ___ U.S. ___, 116 S.Ct. 666, 133 L.Ed.2d 517 (1995) and remand to the Court of Appeals for further consideration.

The district court did not issue a written opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on July 15, 1997. A petition for rehearing was filed on July 28, 1997 and denied on August 22, 1997 (App. A, *infra.*). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) and Supreme Court Rules 13.1 and 13.3.

PROVISIONS OF LAW INVOLVED

United States Constitution, Amendment V:

No person shall ... be deprived of life, liberty, or

property without due process of law; ... .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ...

Title 26, United States Code, §7206(1):

> Any person who --
>
> (1) **Declaration under penalties of perjury.**--Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or
>
> (2) **Aid or assistance.**--Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, or a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; ....
>
> shall be guilty of a felony ... .

Title 18, United States Code, §1956(a)(1)(B)(i):

> (a)(1) Whoever, knowing that the property involved

> in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
> ....
>
> (B) knowing that the transaction is designed in whole or in part--
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity ... shall be sentenced to a fine ... or imprisonment for not more than twenty years, or both.

Title 18, United States Code, Federal Rules of Criminal Procedure, Rule 52:

> (a) **Harmless Error**. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) **Plain Error**. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

This is a joint petition pursuant to Rule 12.4 of the Rules of the Supreme Court.

On January 21, 1993, a six-count Indictment was filed against Defendants-Petitioners, DAVID KNAPP and GRK CORPORATION. DAVID KNAPP was charged with

the following violations: Count One, 18 U.S.C. §371 and 18 U.S.C. §1956(a)(1)(B)(i), conspiracy to engage in money laundering; Count Two, 18 U.S.C. §1956(a)(1)(B)(i), money laundering; Count Three, 26 U.S.C. §6050I(f)(1)(B) and §7206(1) and (2), filing false report of cash payments; Counts Four and Five, 18 U.S.C. §1956(a)(1)(B)(i), money laundering; and Count Six, 26 U.S.C. §6050I(f)(1)(B) and §7206(1) & (2), filing false report of cash payments (ER Exh. A).[1] GRK CORPORATION was charged in Counts Three and Six.

On August 10, 1993, DAVID KNAPP was convicted of Counts One, Four, Five, and Six of the Indictment. He was found not guilty of Counts Two and Three. GRK CORPORATION was found not guilty on Count Three of the Indictment and found guilty of Count Six (ER Exh. M). The relevant facts brought out at trial are set forth below.

The allegations in the indictment and the proof at trial involved the purchase of three vehicles from GRK CORPORATION dba Knapp Ford-Mercury by Ignacio Moreno. Ignacio Moreno was a drug dealer who sold over $30,000,000.00 of marijuana and cocaine through the 1980's (331:6-7; 314:1-2; 315:19-25; 269:4). Mr. Moreno had struck a deal with the Government whereby he would receive a maximum 15-year sentence with the possibility of a reduction depending upon the nature and extent of his cooperation. His deal with the Government included dismissal of charges against his mother, father and sister (275:14-17; 276:12-18). Prior to the deal Mr. Moreno was facing the possibility of life in prison (325:326-327).

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[1]All page references are to Reporter's Transcripts on Appeal unless otherwise noted. ER references Excerpts of Record on appeal.

Disputed issues at trial concerned DAVID KNAPP's knowledge and intent to money launder and to file a false IRS form 8300. The culpability of GRK was premised on the action of its officer DAVID KNAPP.

Mr. KNAPP was acquitted of one count of money laundering and one count of filing a false currency transaction report pertaining to Moreno's initial purchase of a car for his girlfriend. His acquittal of money laundering and filing a false currency transaction report related to the first vehicle purchase by drug dealer Moreno implies that the jury did not credit Moreno's testimony about a prior or contemporaneous agreement, express or implied, to launder money in connection with the sale of this vehicle (related in brief of Appellee at page 5).

The next transaction involved a Lincoln Mark VII. Moreno testified that he came in by himself, dealt only with DAVID KNAPP and signed all documents in front of KNAPP in the name of Jose Ayala. (286; 17-25) (287; 8-9) (289; 13-18). KNAPP testified that Moreno was with other people and that Moreno had told him his uncle was with him (956; 1-5). KNAPP told Moreno to get his uncle and go into the finance office to sign the papers (956; 12-20). Joe Rodriguez, the finance manager of Knapp Ford, testified that a Hispanic male signed the contract in his office (769; 25, 770; 1-12). DAVID KNAPP was not in the office when the documents were signed (773; 7-8).

The final transaction was the purchase of a Ford truck. Moreno came in and said he wanted a truck for his peach orchard (926; 18-20). Again, Moreno said he dealt only with DAVID KNAPP, and he was alone. Leroy Judd, a salesman at Knapp Ford, testified that he was involved in the truck transaction, that DAVID KNAPP had called him out to show the truck to Moreno. The first time, the man

was alone, but he came back later with someone he introduced to Judd as his foreman (760; 2-11, 761; 1-4). The men asked questions appropriate for peach farming, and Mr. Judd spent about an hour going over the characteristics of the truck with him (761; 9-15).

DAVID KNAPP testified that he did not know how the money to purchase vehicles was to be reported, only that it had to be reported (926; 1-4). He testified that he had never seen an 8300 form before Mr. Moreno came in, had never seen an instruction sheet for one, and had no idea of what information was required by the 8300 form (926; 17-24). Bernetta Allen had been in charge of the office since the dealership opened, (705; 14-22) and it was her responsibility to ensure that the 8300 forms were filled out properly (706; 9-23). At the time of the filing of these 8300's, she testified that she thought that they were doing them correctly (695; 25).

The 8300 forms in this case were filled out by Tricia Metcalf (630; 1-3, 638; 23-24), a KNAPP employee of 16-17 years (649; 3-7). She and Bernetta Allen had sat down and tried to figure out the right way to fill out the form, using common sense (652; 17, 662).

Part I of the form required her to state the name of the individual, or organization for "whom this transaction was completed" (694; 18-19). (ER Exh. C) Part II of the form asks for the identity of the individual conducting this transaction (complete only if an agent conducts a transaction for a person in part one, 233; 21-24). Ms. Allen did not recall any specific instructions being given to her by anybody as to how to determine an agency relationship (696; 14-20).

Since 1989, the 8300 form has been changed. The form now (1990) asks for the "<u>name</u> of the person" who

gave the money. (ER Exh.B). Based on this, the dealership now puts that information down rather than the name of the registered owner (662; 16-25, 653; 3-4, 658; 2-25). Before that, dealership employees thought the name of the registered owner was supposed to go on the form (706; 12-18) (714; 22-25) (662; 6-10).

KNAPP personally twice volunteered to law enforcement the correct information, that Moreno had paid for the truck, before they ever had reason to review that form, when they were inquiring into the ownership of the Lincoln purchased by Moreno, pulled over in Texas (Agent Mann, 552-553, 550, 554; Agent Giles, 565-566).

The actual form 8300 is supposed to be returned to Detroit to be entered in the IRS computer (610-611). The government's IRS witness from Detroit testified that she was never asked to determine if the information on the form 8300 (claimed to be erroneous) was ever entered in the IRS computer (611:24-612:3, 614:4-9, 614:21-615:15). Defendants were unable to lay a foundation through this witness for a 1991 Department of Treasury report to Congress detailing that 8300 forms are filed in only 42% of the cases in which they should be filed (613). Because the question of materiality of alleged false statements was removed from juror consideration, no other witness was called to establish the foundation for that report. No evidence was presented by the government that the information on the form 8300 for the truck, upon which defendants' false reporting conviction was based, was ever entered in the IRS computer so that it could be utilized by either the IRS or law enforcement for any purpose.

Following trial, the jury was at an impasse (1251 first readback, 1257 impasse the next day, 1259 second readback). Ultimately, Mr. KNAPP was convicted of

conspiracy to money launder, two counts of money laundering, and GRK and KNAPP were convicted of one count of filing a false currency transaction report.

Defendants timely appealed their convictions to the Ninth Circuit Court of Appeals. Their convictions were affirmed in an unpublished memorandum opinion (App. A). Following their unsuccessful petition for rehearing and suggestion for rehearing en banc, defendants KNAPP and GRK Corporation petitioned this Court for issuance of a writ of certiorari. This Honorable Court granted certiorari, vacated the decision of the Court of Appeals, and remanded the case to the appellate court for further consideration in light of United States v. Gaudin (Knapp v. United States _ U.S. __, 116 S.Ct. 666, 113 L.Ed.2d 517 [1995]).

Following remand, the Ninth Circuit Court of Appeals issued two opinions, the second affirming all of the convictions of defendants.

The Court of Appeals denied defendants' petition for rehearing and suggestion for rehearing en banc following each of its opinions. On September 8, 1997, defendants' emergency motion to the Court of Appeals to stay issuance of the mandate pending application for a writ of certiorari to this Court was granted. Defendant DAVID KNAPP remains on bail on appeal.

REASONS FOR GRANTING THE PETITION AND ISSUING A WRIT OF CERTIORARI

1. INTRODUCTION

In Knapp v. United States ___ U.S. ___, 116 S.Ct. 666, 133 L.Ed.2d 517 (1995) this Honorable Court granted the petition for a writ of certiorari filed by these petitioners,

vacated the decision of the Ninth Circuit Court of Appeals, and remanded the case to the appellate court for further consideration in light of United States v. Gaudin 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

Subsequent to that remand, this Court decided Johnson v. United States ___ U.S. ___, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

This case squarely presents the question left unresolved in Johnson v. United States, supra, and over which the Circuit Courts of Appeal are in disagreement. In Johnson, supra, this Court determined that it should not notice the plain error under Federal Rules of Criminal Procedure, Rule 52(b), because the evidence was overwhelming and essentially undisputed concerning the element of the crime erroneously removed from juror consideration in instructions to the jury.

All questions presented in this petition involve claimed jury instructional error which omitted or misstated disputed elements of the crimes charged, to which no objection was made at trial. Defendants submitted to the court a correct set of jury instructions which were not given. The Court instead instructed the jury pursuant to Ninth Circuit Model Criminal Instructions, which have so simplified the legal concepts involved as to remove from juror consideration those elements of the crimes which distinguish unlawful from lawful conduct.[2]

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[2]Petitioners have been unable to persuade the Ninth Circuit Court of Appeals to address, in any of the three opinions issued in this case, relevant Supreme Court authority cited in support of their claims of instructional error.

After Johnson, supra, the Courts of Appeal are in disagreement concerning the standard to be used in assessing when such instructional plain error should warrant reversal of a conviction. The Sixth Circuit Court of Appeals holds that under Rule 52(b), the defendant must establish that the plain error, for failure to submit to the jury the "materiality" element of false statements, "would affect the outcome of his trial" on that charge (United States v. Rogers 118 F.3d 466, 1997 U.S. App. Lexis 16238, at *13 [6th Cir., 1997]).

The Eighth Circuit Court of Appeals holds that reversal is warranted under Rule 52(b) if the defendant shows that it is "unclear" whether a properly instructed jury would have found the defendant guilty (United States v. Bordeaux No. 96-3968, 1997 U.S. App. Lexis 21547, at *5, 6 [8th Cir., 1997] citing United States v. Webster 84 F.3d 1056, 1067 [8th Cir., 1996]).

The Tenth Circuit Court of Appeals holds that under Rule 52(b) plain error in failing to instruct on an element of a crime will justify reversal of a conviction when the element is disputed, where the record does not reflect that the jury actually found against the defendant on the disputed element and where it was not impossible that the jury returned a conviction without finding against the defendant on all of the elements of the crime (United States v. McMillan 1997 U.S. App. Lexis 18857, at *22, 23 [10th Cir., 1997]).

This Court has previously held in United Brotherhood of Carpenters and Joiners of America v. United States 330 U.S 395, 67 S.Ct. 775, 91 L.Ed. 973 (1947), that jury instructional error on a vital phase of the case affected the substantial rights of the defendants. Plain error warranting reversal of convictions was noted on behalf of two employer groups, though they had not gone to trial and had presented no evidence pertaining to the omitted jury instruction at issue

(330 U.S. 411-412). Their showing of prejudice was sufficient in that the omitted instruction went to the heart of the case.

United States v. Olano 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) addressed plain error in a situation not involving jury instructions, where the claimed error was not shown to have had a prejudicial effect and was not inherently prejudicial (113 S.Ct. at 1781).

In Johnson v. United States ___ U.S. ___, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) the Court again addressed the issue of plain error as it pertained to erroneous jury instructions. The Court determined that there was no need to address the analytical framework for evaluating the error because the issue to which the error applied was essentially uncontroverted at trial and on appeal.

More recently, this Court has granted certiorari in Rogers v. United States No. 96-1279, where instructional error omitting an element of a crime is presented in the context of having been objected to at trial, thereby warranting review under Rule 52(a).

Petitioners submit that certiorari should be granted to resolve the question presented herein upon which the Circuit Courts of Appeal disagree.

The question presented is; when should a court of appeal note plain error and reverse a conviction for the failure to instruct on, or for the erroneous instruction on, a disputed element of the crime charged?

2. THE JURY INSTRUCTIONS PERTAINING TO A VIOLATION OF 26 U.S.C. §§7206(1) AND (2)

In relation to the counts charging a violation of 26 U.S.C. §7206 by filing a false currency transaction report with the IRS, the trial court first instructed the jury that materiality was an element of the crime (ER Exh. F, Instr. No. 22). The trial court then instructed the jury that it need not be concerned whether any false statement was material (ER Exh. F, Instr. No. 24).

This was the same procedure as that followed by the trial court in Johnson v. United States ___ U.S. __, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), and resulted in the same constitutional error. The question of "materiality" was never submitted to the jury, as required by the United States Constitution (United States v. Gaudin 515 U.S. 506, 115 S.Ct. 2310, 2314, 132 L.Ed.2d 444 [1995]).

To the extent that anyone can contest an element of a crime that has been removed from juror consideration, KNAPP and GRK contested the "materiality" of the allegedly false statements. As set forth in the facts cited supra, they produced evidence and testimony that the form 8300 was ambiguous at the time and without clarifying instructions such that under United States v. Gaudin (9th Cir., 1994) 28 F.3d 943 at 948-949, 950, "a persuasive factual argument could have been made that there was a reasonable doubt as to whether [the name written down as the person "for whom the transaction was completed"] would have tended to influence the agency's decision".

As part of the materiality analysis, the statement must have a natural tendency to influence, or be capable of influencing, the decision of the decision making body to which it was addressed (ibid at 948).

Prior to the inception of any investigation concerning DAVID KNAPP, GRK or KNAPP FORD, DAVID KNAPP volunteered all information about each transaction to agent Mann and Agent Giles when each visited his premises (Agent Mann 552-553, 550, 554; Agent Giles 565-566).

The actual form 8300 is supposed to be returned to Detroit. There is no indication that the form pertaining to the truck was ever filed in Detroit, was available to law enforcement, was used by them, or that the information was even entered in the IRS computer in Detroit so that it could be used (611-614). The Government's claim of materiality was, at best, theoretical, and was disputed at trial.

The willfulness instruction given in connection with these transaction reporting charges was also erroneous. It set forth:

> An act was done willfully, as that term is used in the preceding instruction [on filing a false form 8300], if a defendant acted voluntarily and intentionally to violate a known legal duty or acted with a bad purpose or evil motive. Negligent conduct is not sufficient to constitute willfulness. [Emphasis added].

The underlined portion of the instruction authorized a finding of willfulness without finding that petitioners acted voluntarily and intentionally to violate a known legal duty, in violation of Cheek v. United States 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). Pursuant to Frances v. Franklin 471 U.S. 307 at 322, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), an appellate court is powerless to determine which of two instructions on the elements of a crime, one correct and one legally incorrect, the jury applied. Accordingly, the currency transaction reporting conviction

against Mr. KNAPP and GRK Corporation should have been reversed by the Court of Appeals, as the jury in this case could have believed KNAPP's testimony that he did not act voluntarily and intentionally to violate a known duty, and still have convicted him for acting with a perceived "bad purpose".

3. THE JURY INSTRUCTIONS PERTAINING TO CONSPIRACY TO MONEY LAUNDER

Ninth Circuit Pattern Instruction No. 8.05A, used in this case, sets forth the following:

> The defendant is charged in [Count _ _ of] the indictment with conspiring to ___ in violation of Section ____ of Title ____ of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, [beginning on or about ___ and ending on or about ____] [starting sometime before ___] there was an agreement between two or more persons to commit at least one crime as charged in the indictment;
>
> Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and
>
> Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the

> conspiracy, with all of you agreeing on a particular overt act that you find was committed. (ER Exh. F, Instr. No. 16).

This instruction erroneously omits knowledge of an unlawful object of the conspiracy, an essential element of the federal crime of conspiracy. Without the knowledge of an unlawful object of a conspiracy, the criminal intent necessary to commit the crime cannot exist (Ingram v. United States 360 U.S. 672, 795 S.Ct. 1314, 1319, 3 L.Ed.2d 1503 [1959]).

In United States v. Hegwood 977 F.2d 492, 494-495 (9th Cir., 1992) the Ninth Circuit held:

> "In its opening charge to the jury, the district court defined 'conspiracy' as requiring 'an agreement between two or more persons to commit a crime, of which either or both Defendants become a member, knowing at least one of its objects, and at least one member performs at least one overt act to carry out the conspiracy.' The government concedes that this statement of the law was inaccurate because it omitted intent to commit the substantive crime as an element of conspiracy."

A defendant conspirator must know of an unlawful object of the conspiracy in order to intend that the unlawful object be accomplished (Ingram v. United States 360 U.S. 672, 677-678, 79 S.Ct. 1314, 3 L.Ed.2d 1503, [1959]; United States v. Krasovich 819 F.2d 253, 255-256 [9th Cir., 1987]).

The conspiracy instruction given in this case omitted

that essential element of the federal crime of conspiracy. This was a constitutional error pursuant to Sullivan v. Louisiana 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), and United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 2314, 132 L.Ed.2d 444 (1995).

The error went to the heart of the disputed issues at trial, KNAPP's knowledge and intent in selling three vehicles to Moreno. In such circumstances this Court has previously noted the plain error and reversed the conviction (United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395, 411-412, 67 S.Ct. 775, 91 L.Ed. 973 [1947]).

4. THE JURY INSTRUCTIONS PERTAINING TO MONEY LAUNDERING

In United States v. Stein 37 F.3d 1407 (9th Cir., 1994), cert denied., 513 U.S. 1181, 115 S.Ct. 1170, 130 L.Ed.2d 1124 (1995), virtually identical instructions on money laundering as were given in this case led to the reversal of the defendant's conviction for structural error (ER Exh. F, Instr. Nos. 18, 19). Stein was filed while this case was pending before the Court of Appeals.[3]

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[3]Stein has since been both followed and distinguished in the Ninth Circuit in circumstances presented in this case (compare the opinion in this case finding no error, with that in United States v. Turman No. 94-50305, 97 Daily Journal D.A.R. 11853 at 11854 [filed 09/12/97 and superseding the opinion in the same case at 104 F.3d 1191 at 1195], and United States v. Ripinski 109 F.3d 1436, 1442-1443, [9th Cir., 1997] holding the instruction to be error).

Further, the Ninth Circuit Court of Appeals has now

. . . . . **Footnote Cont' on Next Page**

The critical error addressed in United States v. Stein, supra at 1409, was repeated in this case; that is, the jury was instructed, without further explanation, that it could find that Mr. KNAPP knew that the money came from some form of unlawful activity (money laundering element #2, ER Exh. F, Instr. No. 18), merely by concluding that he was aware of his actions, without ever determining that he *in fact* knew of

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Footnote 3 Con't: held these precise instructions not to constitute plain error because the defendant could have objected at trial to the instruction given (United States v. Turman No. 94-50305, 97 Daily Journal D.A.R. 11853 at 11854 [filed 09/12/97]). In so holding, the Ninth Circuit joins the Fourth, Fifth and District of Columbia Circuits in the split with the First, Second, Third, Seventh, Eighth, Tenth and Eleventh Circuits over when the error must be plain, i.e., at trial or on appeal (compare United States v. David 83 F.3d 638 [4th Cir., 1996], United States v. Calverley 37 F.3d 160 [5th Cir., 1994], cert. denied, 115 S.Ct. 1266 [1995], United States v. Dupaquier 74 F.3d 615, 619 [5th Cir., 1996] and United States v. Washington 12 F.3d 1128 [D.C. Cir., 1994] cert. denied, 115 S.Ct. 98 [1994] with United States v. Barone 114 F.3d 1284 [1st Cir., 1997], United States v. Viola 35 F.3d 37, 41-43 [2nd Cir., 1994] cert denied, 115 S.Ct. 1270 [1995]; United States v. Retos 25 F.3d 1220, 1229-1230 [3rd Cir., 1994], United States v. Ross 77 F.3d 1525 [7th Cir., 1996], United States v. Baumgardner 85 F.3d 1305, 1308-1309 [8th Cir., 1996], United States v. Webster 84 F.3d 1056 [8th Cir., 1996], United States v. McMillan 1997 U.S. App. Lexis 18857 [1997], and United States v. Kramer 73 F.3d 1067, 1075 [11th Cir., 1996]).

the unlawful source of the funds.[4]

This is made clear in Stein by the Court in that case, as follows, at 1409:

> Stein argues part of the district court's instructions to the jury on the money laundering counts were negated by a general instruction on when an act is done "knowingly," and this relieved the prosection of its burden to prove an essential element of the money laundering counts. [Emphasis added].

Pursuant to Frances v. Franklin 471 U.S. 307 at 322, 105 S.Ct. 1965, 85 L.Ed.2d 61 (1985), and United States v. Stein 37 F.3d 1047 (9th Cir., 1994), cert denied, 513 U.S. 1181, 115 S.Ct. 1170, 130 L.Ed.2d 1124 (1995), reversal of Mr. KNAPP's money laundering convictions is warranted because an appellate court is not free to presume which instructions on the elements of the crime the jury followed.

This money laundering instructional error was compounded by the trial court's erroneous conspiracy instructions. In addition to failing to instruct the jury that the defendant must know of an unlawful object of the conspiracy, the trial court gave the following charge to the jury:

> "Once you have decided that the defendant was a member of a conspiracy, the defendant is responsible for what other conspirators said

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[4]The precise instructions at issue are set forth verbatim in the initial memorandum decision in this case, in Appendix A.

> or did to carry out the conspiracy, whether or not the defendant knew what they said or did. (Vol 6 RPT TR 1121: 21-25; Emphasis added; ER Exh. F, Instr. No. 16).

Of course, the claim of the Government's informant witness, Ignacio Moreno, was that he engaged in the three vehicle sales transactions with Mr. KNAPP intending to launder his drug trafficking proceeds.

Petitioners submit that applying the instructions as a whole, the jury was not required to find that Mr. KNAPP knowingly engaged in money laundering. Under the instructions given, the jury was not required to find against him on each element of the crime of money laundering, in violation of United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

5. PLAIN ERROR SHOULD BE NOTED WHEN THE ERROR PERTAINS TO INSTRUCTIONS GIVEN TO THE JURY CONCERNING ELEMENTS OF THE CRIME WHICH ARE CONTESTED AT TRIAL

United States v. Gaudin 515 U.S. 506, 115 S.Ct. 2310, 2314, 132 L.Ed.2d 444 (1995) holds that a criminal defendant has not received his constitutional right to a jury trial when the jury has not passed on an element of the crime. This core right is set forth in Sullivan v. Louisiana 508 U.S. 275, 113 S.Ct. 2078, 2082, 124 L.Ed.2d 182 (1993), wherein the majority cited the dissent of Justice Blackman in Rose v. Clark 478 U.S. 570, 106 S.Ct. 3101, 3114, 92 L.Ed.2d 460 (1986), and the dissent of Justice Stevens in Pope v. Illinois 481 U.S. 497, 107 S.Ct. 1918, 1926, 95 L.Ed.2d 439 (1987).

Justice Blackman wrote the following in Rose v. Clark 478 U.S. 570, 593, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) and cited in Sullivan v. Louisiana, supra:

> "Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime. See *Connecticut v. Johnson*, 460 U.S. 73, 95, and n. 3 [103 S.Ct. 969, 982, and n. 3, 74 L.Ed.2d 823] (1983) (POWELL, J., dissenting)." *Cabana v. Bullock*, 474 U.S. 376, 384-385, 106 S.Ct. 689, 696, 88 L.Ed.2d 704; see also *Cole v. Arkansas*, 333 U.S., at 202, 68 S.Ct., at 517. The Constitution does not allow an appellate court to arrogate to itself a function that the defendant, under the Sixth Amendment, can demand be performed by a jury.

Justice Stevens' dissent in Pope v. Illinois 481 U.S. 497, 509-510, 107 S.Ct. 1918, 1926, 95 L.Ed.2d 439 (1987) included the following, and cited in Sullivan v. Louisiana, supra:

> It is fundamental that an appellant court (and for that matter, a trial court) is not free to decide in a criminal case that, if asked, a jury *would* have found something that it did not find. We have consistently rejected the possibility of harmless error in these circumstances. .... No court could ever determine that the instructions on the element were superfluous, since the error in the instructions went to the ultimate fact that the juries were required to find. *Rose v. Clark*

> did not modify the precedents requiring that a jury find all of the elements of a crime under the proper standard, any more than it modified the Sixth Amendment's provision that "[i]n all criminal prosecutions, the accused shall enjoy the right to a ... trial by an impartial jury." (Original emphasis)

Prior to Rose v. Clark 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), Frances v. Franklin 471 U.S. 307, 322, 105 S.Ct. 1965, 1975, 85 L.Ed.2d 344 (1985) held:

> Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.

Consistent with these constitutional principles, petitioners DAVID R. KNAPP and GRK Corporation submit that where, as here, the jury was not properly instructed on factually disputed elements of the crimes charged, resulting in convictions for conduct that the jury might not have found criminal under proper jury instructions, plain error should be noted and the convictions reversed.

CONCLUSION

For the foregoing reasons, petitioners DAVID R. KNAPP and GRK Corporation submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROGER T. NUTTALL
NUTTALL BERMAN ATTORNEYS

DATED: September 29, 1997

/s/
ROGER T. NUTTALL, Attorney for
Petitioners

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DAVID R. KNAPP, *Defendant-Appellant.*	]]]]]]]]]	No. 94-10022 D.C. No. CR-93-05019-OWW
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GRK CORPORATION, dba Knapp Ford/Mercury, *Defendant-Appellant.*	]]]]]]]]]	No. 94-10023 D.C. No. CR-93-05019-OWW **ORDER AND OPINION**

On Remand from the United States Supreme Court

Opinion Filed May 9, 1997
Opinion Withdrawn July 15, 1997

Filed July 15, 1997

Before: Arthur L. Alarcon and Cynthia Holcomb Hall, Circuit Judges, and Samuel P. King,* District Judge

Opinion by Judge King

*Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

APPENDIX A

SUMMARY

Criminal Law and Procedure/Litigation and Procedure

On remand from the Supreme Court, the court of appeals affirmed a judgment of conviction of the district court. The court held that the erroneous removal of the issue of materiality of false statements in currency reports from the jury is not reversible error when the evidence of materiality is overwhelming.

Appellants David Knapp and GRK Corporation (Knapp) were charged with (1) conspiracy to money launder, (2) money laundering, and (3) filing false currency transaction reports.

On the first count, the district court instructed the jury that Knapp had to have knowledge of the objective of the conspiracy--money laundering--and that he had to intend to help accomplish it. The court also instructed that the jury had to find there was a plan to commit a crime alleged in the indictment as an object of the conspiracy.

On the second count, the court instructed on the elements of money laundering. The court immediately gave a general instruction defining "knowingly," stating that: "An act is done knowingly if the defendant is aware of the act and does not act or fail to act through ignorance, mistake or accident. As to the money laundering, the government is not required to prove that the defendant knew that his acts or omissions were unlawful."

The court did not submit the issue of materiality of false statements in currency reports to the jury on the third count.

Knapp was convicted.

After the Ninth Circuit affirmed, the Supreme Court decided *United States v. Gaudin*, 115 U.S. 2310 (1995), upholding the Ninth Circuit. Contravening every other circuit, the Ninth Circuit had held that the trial court erred in treating the materiality element of the charges as a question of law, rather than submitting it to the jury.

Knapp filed a petition for a writ of certiorari, arguing that the conspiracy instruction erroneously failed to require the jury to find that he had knowledge of the unlawful object of the conspiracy; that the general jury instruction defining the "knowingly" improperly negated an element of money laundering from the jury's consideration; and that the district court erred in failing to submit the issue of materiality to the jury on the currency reporting charge.

The Supreme Court vacated the Ninth Circuit's judgment, and remanded for consideration in light of *Gaudin*.

[1] *Gaudin* stands for the proposition that criminal defendants have a right to have a jury determine, beyond a reasonable doubt, the defendant's guilt of every element of the crime with which he or she is charged.

[2] The conspiracy instructions adequately informed the jury as to the intent required to convict on a conspiracy charge. Nothing in *Gaudin*, which addressed a different issue, required reversal on that count.

[3] The phrase "as to money laundering" distinguished that instruction from one given in a prior case, in which the Ninth Circuit reasoned that the "knowingly" instruction

purported to apply to both the object of the conspiracy and to the money laundering act itself. The added phrase "as to money laundering" made sufficiently clear that the corresponding sentence applied only to the crime itself. [4] The instructions addressed the possibility that the jury could have omitted the second element of money laundering and convicted without finding Knapp knew the money represented illegal drug proceeds. The element was not improperly taken away from the jury. There was no *Gaudin* error with regard to the money laundering counts.

[5] Materiality of the failure to report income is an essential element for the jury to determine because it is fact-dependent. [6] Removing the element of materiality from the jury's consideration in the filing false currency report charge was erroneous.

[7] The evidence of materiality in Knapp's failure to report properly transactions in excess of $10,000 was overwhelming, and thereby precluded reversal. Because the record demonstrated that the error was not prejudicial and failed to seriously affect the fairness or integrity of the proceedings, the currency reporting conviction was proper.

COUNSEL

W. Scott Quinlan, Fresno, California, and Roger T. Nuttall and Mark W. Coleman of Nuttall Berman Attorneys, Fresno, California, for the defendant-appellant David R. Knapp. Ronald H. Abernethy of Harris, Perisho & Woodwon, Stockton, California, for defendant-appellant GRK Corporation.

Richard A. Friedman, United States Department of Justice,

Washington, D.C., for the United States.

ORDER

The opinion filed May 9, 1997 is withdrawn.

OPINION

KING, District Judge:

Appellants David R. Knapp and GRK Corporation d/b/a/ Knapp Ford/Mercury (collectively "Knapp") appealed jointly from a conviction and sentence for (1) conspiracy to money launder, 18 U.S.C. § 371; (2) money laundering, 18 U.S.C. § 1956(a)(1)(B)(i); and (3) filing false currency transaction reports, 26 U.S.C. §§ 6050I(f)(1)(B) and 7206(1) & (2). We affirmed in an unpublished disposition. *United States v. Knapp*, 52 F.3d 335 (9th Cir. 1995). Knapp petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court granted certiorari, vacated our decision, and remanded the case for our further consideration in light of *United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. 2310. *Knapp v. United States*, ___ U.S. ___, 116 S.Ct. 666, 133 L.Ed.2d 517 (1995). In light of *Gaudin*, we affirm the decision.

DISCUSSION

I. Jury Instructions

The standard of review of a district court's denial of a

proposed jury instruction turns on the nature of the error alleged. *United States v. Duran*, 59 F.3d 938, 940-41 (9th Cir.), *cert. denied*, 116 S.Ct. 525 (1995). We review *de novo* whether the district court's instructions adequately presented the defendant's theory of the case. *Id.* If the district court's instructions fairly and adequately covered the elements of the offense, we review the instruction's "precise formulation" for an abuse of discretion. *United States v. Woodley*, 9 F.3d 774, 780 (9th Cir. 1993) (citing *United States v. Lunstedt*, 997 F.2d 665 (9th Cir. 1993). Here, the issue is a question of law, whether the trial court presented the jury with every element of the crimes charged pursuant to *United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. 2310. Therefore, the proper standard of review for denial of a jury instruction is *de novo* rather than abuse of discretion. If a jury instruction misstates elements of a statutory crime, the standard of review is also *de novo*. *United States v. Johnson*, 956 F.2d 197, 199 (9th Cir. 1992) (citation omitted).

II. United States v. Gaudin

In *United States v. Gaudin*, the trial court convicted respondent of violating 18 U.S.C. § 1001, making material false statements in a matter within the jurisdiction of a federal agency. 515 U.S. at ____, 115 S.Ct. at 2312. Contravening every other circuit, the Ninth Circuit held that the trial court erred in treating the "materiality" element of the charges as a question of law, rather than submitting it to the jury. *Gaudin*, 997 F.2d 1267, 1271 (9th Cir.), *rehearing granted*, 5 F.3d 374 (1993). On rehearing en banc, we emphasized that taking the question of materiality from the jury denied Gaudin his constitutional rights to due process and trial by jury. *Gaudin*, 28 F.3d 943, 949 (9th

Cir. 1994).

[1] The Supreme Court agreed. 515 U.S. at ___, 115 S.Ct. at 2314. *Gaudin* stands for the general proposition that the Constitution gives criminal defendants a right to have a jury determine, beyond a reasonable doubt, the defendant's guilt of every element of the crime with which he or she is charged. *Id.* Justice Scalia reasoned:

> The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.

Id. We now apply this "*Gaudin* reasoning" to the charges in the present case.[1]

A. *Conspiracy Instructions*

[2] In his petition for certiorari, Knapp contended that the conspiracy instruction erroneously failed to require the jury to find that he had knowledge of the unlawful object of the conspiracy. Although the Supreme Court's remand order to require us to review all claims in light of *Gaudin*, we find that *Gaudin* does not apply to this situation and that the claim lacks merit in any event. The trial judge instructed that Knapp had to have knowledge of the objective of the conspiracy--money laundering--and that he had to intend to help accomplish it. He also stated that the jury had to find

[1]In light of the Supreme Court's general remand in light of *Gaudin*, we review all counts here.

there was a plan to commit a crime alleged in the indictment as an object of the conspiracy. Taken as a whole, the instruction adequately informed the jury as to the intent required to convict on a conspiracy charge and conformed to this circuit's precedents. Nothing in *Gaudin*, which addresses the different issue of whether the district court can decide as a matter of law an element of the crime, requires us to reverse on this count. Accordingly, we affirm the conspiracy count.

B. *Money-Laundering Instructions*

Knapp argues that the general jury instruction defining "knowingly" improperly negated an element of money laundering from the jury's consideration, contrary to the holdings of *Gaudin* and United *States v. Stein*, 37 F.3d 1407, 1410 (9th Cir. 1994). Knapp is wrong.

The *Stein* court reversed convictions for money laundering because a general instruction defining "knowingly" conflicted with the money-laundering instruction. The court distinguished between the two types of "knowledge" in money laundering: "[w]hile to sustain a conviction the defendant must have known that the primary predicate activity (in this case [*Stein*] securities, mail and wire fraud) was unlawful, he need not have known that the secondary act of laundering the proceeds was unlawful." *Stein*, 37 F.3d at 1410 (citation omitted).

In *Stein*, the trial court instructed the jury "the government must prove ... the defendant knew that the property represented the proceeds of securities fraud, mail fraud, or wire fraud." *Id.* The court then gave a general instruction on knowledge: "[a]n act is done knowingly if the defendant

is aware of the act and doesn't act through ignorance, mistake or accident. The Government is not required to prove that the defendant knew that his acts or omissions were unlawful." *Id.* This general instruction is Ninth Circuit Model Criminal Instruction No. 5.06 (which was given in Knapp's case). The *Stein* court held:

> This general instruction conflicts with the district court's previous instruction on money laundering, because it purports to apply to all of the defendant's action--his predicate acts of fraud as well as his secondary act of money laundering.
>
> Where two instructions conflict, a reviewing court cannot presume that the jury followed the correct one. Here, by applying the later general instruction, a jury could convict Stein without finding that he knew his predicate acts of fraud were unlawful. Taken as a whole, the instructions omitted an element of the offense.... Such error cannot be harmless.

Id.

The instructions in Knapp's case were similar, but with two critical differences. Here, instruction No. 18 gave the elements of money laundering:

> To establish the crime [of money laundering], the government must prove beyond a reasonable doubt the following four elements:
>
> (1) The defendant *knowingly* conducted a financial transaction.

> (2) The defendant must *know* that the transaction involved property which represented the proceeds of some form of unlawful activity.
>
> (3) The transaction involved property which in fact was drug trafficking proceeds.
>
> (4) The defendant engaged in the transaction with the intent to conceal or disguise the nature, location, source, ownership, or control of property which was drug trafficking proceeds. (emphasis added).

As in *Stein*, the money-laundering instruction was followed immediately by a general instruction defining "knowingly:"

> An act is done knowingly if the defendant is aware of the act and does not act or fail to act through ignorance, mistake or accident. *As to money laundering*, the government is not required to prove that the defendant knew that his acts or omissions were unlawful. (emphasis added).

[3] The emphasized phrase "as to money laundering" distinguishes the latter instruction from the one given in *Stein*. In *Stein*, the court reasoned that the "knowingly" instruction purported to apply to both the object of the conspiracy and to the money laundering act itself. The added phrase "as to money laundering" made sufficiently clear that the corresponding sentence applied only to the crime itself.

Moreover, the court gave the following additional instruction not given in *Stein*:

> The term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the defendant knew that the property involved in the transaction represented proceeds from some form, though not necessarily which form of activity that constitutes a felony under federal or state law. Drug trafficking is a felony under federal or state law.

[4] Combined, these differences distinguish *Stein*. These differences directly address the possibility that the jury could have omitted the second element of money laundering and convicted without finding Knapp knew the money represented illegal drug proceeds. Since we find that *Stein* does not apply, and therefore, that the element was not improperly taken away from the jury, we also find there was no *Gaudin* error with regard to the money laundering counts. Accordingly, we affirm the money laundering convictions.

C. *Currency Reporting Instructions*

Although materiality is an element under 26 U.S.C. §§ 7206(a) & (2), the trial court did not submit the issue to the jury. Knapp argues that under *Gaudin*, it was required to do so. This court recently decided whether the question of materiality belongs to the jury under 26 U.S.C. § 7206(1). The answer is "yes." *United States v. Uchimura*, No. 94-10579, 1997 WL 76248 (9th Cir. Feb. 25, 1997).

[5] In sum, *Uchimura* held that "the Supreme Court's reasoning [in *Gaudin*] applies with equal potency to every crime of which materiality is an element." *Id.* at *2. The court found that materiality under 26 U.S.C. § 7206(1) is an essential element for the jury to determine because it is fact-

dependent:

> Under most circumstances, this Court's pre-*Gaudin* statement that "any failure to report income is material" is one with which most juries would agree, since any failure to report income usually affects a determination of whether tax is owed.... But just because a jury usually would agree with such a statement does not mean that a jury must agree with it, as a matter of law. Even if any failure to report income is material in most circumstances, it is not necessarily material in all circumstances, since the materiality of an underreporting of income necessarily depends on the facts of each case.

Id. at *3 (citation omitted). The decision effectively overrules *United States v. Flake*, 746 F.2d 535 (9th Cir. 1984), *cert. denied*, 469 U.S. 1225 (1985), which held that materiality was a question of law, rather than a question of fact, under 26 U.S.C. § 7206(1). *Uchimura*, 1997 WL at *4.[2]

[6] Accordingly, the district court's instruction removing the element of materiality from the jury's consideration in the filing false currency report charge was erroneous.

III. Reversible Error

Once this court finds that an instruction was erroneous,

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[2]Our prior decision declined to expand the Ninth Circuit's *Gaudin* holding to § 7206 because at the time, *Flake* was well-established in this circuit and directly on point.

we must determine whether that error requires a reversal. *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). We conclude that it does not. *Johnson v. United States*, U.S. 117 S.Ct. 1544 (1997). In *Johnson*, the Supreme Court found that failure to submit the materiality issue to the jury where evidence of materiality was "overwhelming" and effectively uncontroverted was not plain error and did not warrant reversal. ___ U.S. at ___, 117 S.Ct. at 1547-48. To warrant reversal in a case where a *Gaudin*-type error is made, the error must "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." ___ U.S. at ___, 117 S.Ct. at 1550 (quoting *Olano*, 507 U.S. at 736, 113 S.Ct. at 1779).

[7] Here, we find that the evidence of materiality in Knapp's failure to report properly several transactions in excess of $10,000 was overwhelming, and thereby precludes reversal. Because the record demonstrates that the error was not prejudicial and failed to seriously affect the fairness or integrity of the proceedings, we affirm the currency reporting conviction.

IV. CONCLUSION

We are reinstating our prior disposition as to all other issues. Accordingly, this case is AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID R. KNAPP,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GRK CORPORATION, dba Knapp Ford/ Mercury,

Defendant-Appellant.

No. 94-10022
D.C. No. CR-93-05019-OWW

No. 94-10023
D.C. No. CR-93-05019-OWW

FILED
April 5, 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted November 17, 1994
San Francisco, California

Before: ALARCON and HALL, Circuit Judges, and KING,** District Judge

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Defendants/Appellants David R. Knapp and GRK Corporation dba Knapp Ford/Mercury (collectively "Knapp") appeal jointly from a conviction and sentence for (1) conspiracy to money launder, 18 U.S.C. § 371; (2) money laundering, 18 U.S.C. § 1956(a)(1)(B)(i); and (3) filing false currency transaction reports, 26 U.S.C. §§ 6050I(f)(1)(B) and 7206(1) & (2). We have jurisdiction pursuant to 28 U.S.C. § 1291, and affirm.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

DISCUSSION

I. Jury Instructions.

The standard of review of a district court's denial of a proposed jury instruction is unresolved in this circuit. United States v. Woodley, 9 F.3d 774, 779 (9th Cir. 1993). The standard is either de novo or abuse of discretion. Id. "We examine 'whether or not the instructions taken as a whole were misleading or represented a statement inadequate to guide the jury's deliberations." United States v. Powell, 955 F.2d 1206, 1210 (9th Cir. 1992) (quoting United States v. Kessi, 868 F.2d 1097, 1101 (9th Cir. 1989)). We need not resolve the standard of review here because the conflict is not dispositive; Knapp's arguments fail under either standard.

A. Conspiracy Instructions.

The trial court gave a virtually unmodified version of Ninth Circuit Model Criminal Instruction 8.05A on conspiracy:

> The defendant David R. Knapp is charged in Count 1 of the indictment with conspiracy to engage in money laundering in violation of United States law. In order for a defendant to be found guilty of that charge, the United States must prove each of the following elements beyond a reasonable doubt:
>
> First, beginning on or about May 9th, 1989, and ending on or about October 6, 1989, there was an agreement between two or more persons to commit at least one crime charged in the indictment; second, the defendant became a member of the conspiracy knowing of at least one of its objects and

intending to help accomplish it; and third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy. All of you must agree on a particular overt act that you find was committed.

. . . .

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. . . . You must find there a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy. ***And here the object of the conspiracy in all three cases is money laundering.***[1]

. . . .

An overt act does not, of itself, have to be unlawful. . . . The government is not required to prove that the defendant personally did one of the overt acts. Once you have decided that the defendant was a member of a conspiracy, the defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not the defendant knew what they said or did.

. . . .

Even though a defendant did not directly conspire with every other conspirator in the overall scheme, the defendant, would, in effect, have agreed to participate in the conspiracy if it is proved beyond a reasonable doubt that the defendant conspired with one or more conspirators to carry out at least one of the objects of the conspiracy, the defendant knew or had reason to know that other conspirators were involved with those with whom the defendant directly

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[1]This sentence differs from the pattern instruction and is not in the written copy of the court's instructions.

conspired, and the defendant had reason to believe that whatever benefits the defendant might receive from the conspiracy were probably dependent upon the success of the entire venture. (Emphasis added).

1. Amendment of the Indictment.

Knapp argues that the emphasized phrases materially amended the indictment by allowing the jury to convict for a conspiracy other than to money launder. United States v. Vowiell, 869 F2d 1264, 1271 (9th Cir. 1989) ("It is plain error for a district court to give instructions that permit the jury to convict the defendant for a crime that was not charged, because the court may not substantially amend the indictment through its instructions to the jury.") (citations and quotation marks omitted). The 7-count indictment contained two substantive crimes--three counts of money laundering and two counts of filing false currency transaction reports--but only charged for conspiracy to money launder.[2] Thus, Knapp contends that the instructions allowed the jury to convict him for conspiring to file false currency transactions reports.

The court reviews de novo whether there has been a material amendment of an indictment. United States v. Armstrong, 909 F.2d 1238, 1241 (9th Cir.), cert. denied, 498 U.S. 870 (1990). If there was error here, however, it was not so much an amendment to the indictment as it was an incorrect explanation of the conspiracy charge in the indictment. No one is contending that the government intended to convict Knapp for conspiracy to file false reports.

Knapp argues that, taking the instructions literally,

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[2]The seventh count was for forfeiture, 18 U.S.C. § 982.

the jury could have found a "conspiracy to money launder" by finding that Knapp agreed with Moreno to file false currency transaction reports. Taken in context, however, it is more likely that the jury indeed found a "conspiracy to money launder" by finding that Knapp agreed with Moreno to money launder.

In its instructions, the trial court clearly explained that it was defining each count separately. The first sentence of the instruction quoted previously reads: "[t]he defendant David R. Knapp is charged in Count 1 of the indictment with conspiracy to engage in money laundering in violation of United States law" (emphasis added). After the conspiracy instruction, the court explained: "[n]ow I'm going to tell you the elements of the crime of money laundering. Counts 2, 4, and 5 of the indictment charge Defendant David R. Knapp with money laundering." After explaining those elements, the court continued: "[n]ow I'm going to define the elements of the crime of filing a false report." Additionally, the verdict form was split into counts; count one was titled "18 USC 371 AND 1956(a)(1)(b)(i) - Conspiracy to Engage in Money Laundering." (emphasis added).

When reading the written instructions, the trial court apparently realized that the references in the pattern instruction to "at least one crime in the indictment" and "at least one of the objects of the conspiracy" were potentially confusing. The court extemporaneously added the sentence (highlighted above): "[a]nd here the object of the conspiracy in all three cases [all three vehicle transactions] is money laundering."[3] This sentence clarified that the conspiracy

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[3]Knapp also contends that, by this phrase, the court directed a verdict against him on a disputed element of the conspiracy count. He apparently argues that the phrase told

was for money-laundering and not conspiracy to commit some other crime.

Additionally, two of the overt acts of the money-laundering conspiracy count were filling out IRS Form 8300s in the name of others besides Moreno. In essence, the false currency report counts also constituted overt acts. Thus, even if the jury misunderstood the instruction to mean that false reporting was required for money laundering, the error was harmless.

In sum, when reading the instructions as a whole, we find no reversible error.

2. Unanimity Instruction.

Knapp also argues that the conspiracy instruction was insufficient because the court did not give a specific unanimity instruction. Knapp cites United States v. Gilley, 836 F.2d 1206, 1211-13 (9th Cir. 1988). This argument fails.

In Gilley, this court held:

> [u]sually a general unanimity instruction suffices. In United States v. Echeverry, 698 F.2d 375 (9th Cir. 1983), modified, 719 F.2d 974 (9th Cir. 1983), however, we held that a different rule applies when a "genuine possibility" of juror confusion exists.

836 F.2d at 1211 (citation omitted). Gilley involved "a genuine possibility that the jurors were not unanimous as to

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the jury that there was a conspiracy to money-launder. Taken in context, however, the court clearly was referring to the instructions, not to the substance of the count.

the conjunction of two of the material elements of the crime." Id. at 1212. In turn, Echeverry involved multiple schemes where defendant committed different acts, and the jury indicated confusion concerning multiple conspiracies. 719 F.2d at 975.

Here, there is no genuine possibility of such jury confusion. The conspiracy here was relatively simple. As outlined in the indictment, the conspiracy involved Knapp agreeing with Moreno, and others unknown to the grand jury, to money launder between May 9, 1989 and Oct. 6, 1989. The indictment lists nine possible overt acts. A general unanimity instruction was sufficient. United States v. Ferris, 719 F.2d 1405 (9th Cir. 1983). Moreover, Knapp did not object on these grounds below and did not submit a conspiracy instruction with specific unanimity provisions.

3. Knapp's Defense Instruction.

Knapp argues that the court erred in refusing the following instruction explaining his defense theory:

> DAVID KNAPP contends that he never agreed with IGNACIO MORENO to conceal the source of money, or that he knew the money was derived from narcotics trafficking.

This proposed instruction added little if anything to the conspiracy instructions given by the court. The court instructed that the government must prove the elements of conspiracy beyond a reasonable doubt. Refusing the instruction was not error. United States v. Lopez-Alvarez, 970 F.2d 583, 597 (9th Cir.) ("nor is [a defendant] entitled to an instruction that merely duplicates what the jury has already been told"), cert. denied, 113 S. Ct. 504 (1992).

B. Money-Laundering Instruction.

1. Taint by Conspiracy Instructions.

Knapp argues that error in the conspiracy instructions tainted the money-laundering instructions. He again focuses on the phrase "[a]nd here the object of the conspiracy in all three cases is money laundering. He claims that the phrase directed the jury to find money laundering." However, as explained above, the phrase taken in context merely explained the conspiracy count. The phrase was not misleading and did not direct the jury to find Knapp guilty on the substantive money-laundering counts.

2. Pinkerton Liability.

Next, Knapp takes issue with the highlighted sentence in the following paragraph of the conspiracy instruction:

> An overt act does not, of itself, have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The government is not required to prove that the defendant personally did one of the overt acts. Once you have decided that the defendant was a member of a conspiracy, the defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not the defendant knew what they said or did.

Knapp contends that the sentence imposed Pinkerton liability; he asserts error in not giving a corresponding foreseeability instruction. He appears to be arguing that the jury could have convicted him on the substantive money-laundering counts based on Moreno's money-laundering activities in a conspiracy to file false currency reports.

Taken in context, however, the sentence refers to overt acts making up the conspiracy, not other substantive crimes committed in furtherance of the conspiracy. The sentence correctly instructed that Knapp need not have personally committed an overt act towards commission of the objective of the conspiracy.

3. Effect of Ratzlaf v. United States.

Knapp next contends that under 18 U.S.C. § 1956(a)(1)(B)(i) the government is required to prove he knew money laundering was unlawful. The trial court gave no such instruction, thus Knapp asserts error. Knapp relies on Ratzlaf v. United States, 114 S. Ct. 655 (1994).

In Ratzlaf, the Court was construing the statutory language "willfully violated." The court reasoned

> We do not dishonor the venerable principle that ignorance of the law generally is no defense to a criminal charge. In particular contexts, however, Congress may decree otherwise. That, we hold, is what Congress has done with respect to 31 U.S.C. § 5322(a) [providing "a person willfully violating this subchapter. . . shall be fined not more than $250,000, or imprisoned for not more than five years, or both"] and the provisions it controls.

Id. at 663 (citations omitted). In this case, the money laundering statute at issue, 18 U.S.C. § 1956(a)(1)(B)(i), does not require "willfulness." Thus, Ratzlaf does not apply. See United States v. Santos, 20 F.3d 280, 284 n.3 (7th Cir. 1994) ("Unlike the criminal enforcement provision at issue in Ratzlaf, 31 U.S.C. § 5322(a), the money laundering statutes . . . 18 U.S.C. §§ 1956(a)(1)(B)(i) and 1956 (a)(3)(A), do not contain a willfulness requirement and,

instead, contain specific and detailed requirements concerning the defendant's intent and knowledge.").

4. Effect of United States v. Stein.

The final issue on the money-laundering counts is whether the general jury instruction defining "knowingly" negated an element of money laundering from the jury's consideration. Knapp cites to the recent decision, United States v. Stein, 37 F.3d 1407 (9th Cir. 1994), cert. denied, 63 USLW 3628 (Feb. 21, 1995).

"Whether a jury instruction misstates elements of a statutory crime is a question of law reviewed de novo." United States v. Johnson, 956 F.2d 197, 199 (9th Cir. 1992).

The Stein court reversed convictions for money laundering because a general instruction defining "knowingly" conflicted with the money-laundering instruction. The court distinguished between the two types of "knowledge" in money laundering: "[w]hile to sustain a conviction the defendant must have known that the primary predicate activity (in this case [Stein] securities, mail and wire fraud) was unlawful, he need not have known that the secondary act of laundering the proceeds was unlawful." Stein, 37 F.3d at 1410 (citations omitted).

In Stein, the trial court instructed the jury "the government must prove. . . the defendant knew that the property represented the proceeds of securities fraud, mail fraud, or wire fraud." Id. The court then gave a general instruction on knowledge: "[a]n act is done knowingly if the defendant is aware of the act and doesn't act through ignorance, mistake or accident. The Government is not required to prove that the defendant knew that his acts or

omissions were unlawful." Id. This general instruction is Ninth Circuit Model Criminal Instruction No. 5.06 (which was given in Knapp's case). The Stein court held:

> This general instruction conflicts with the district court's previous instruction on money laundering, because it purports to apply to all of the defendant's actions--his predicate acts of fraud as well as his secondary act of money laundering.
>
> Where two instructions conflict, a reviewing court cannot presume that the jury followed the correct one. Here, by applying the later general instruction, a jury could convict Stein without finding that he knew his predicate acts of fraud were unlawful. Taken as a whole, the instructions omitted and element of the offense. . . . Such error cannot be harmless.

Id.

The instructions in Knapp's case were similar, but with two critical differences. Here, instruction No. 18 gave the elements of money laundering:

> To establish the crime [of money laundering], the government must prove beyond a reasonable doubt the following four elements:
>
> (1) The defendant knowingly conducted a financial transaction.
>
> (2) The defendant must know that the transaction involved property which represented the proceeds of some form of unlawful activity.

(3) The transaction involved property which in fact was drug trafficking proceeds.

(4) The defendant engaged in the transaction with the intent to conceal or disguise the nature, location, source, ownership, or control of property which was drug trafficking proceeds. (emphasis added).

As in Stein, the money-laundering instruction was followed immediately by a general instruction defining "knowingly":

> An act is done knowingly if the defendant is aware of the act and does not act or fail to act through ignorance, mistake or accident. As to money laundering, the government is not required to prove that the defendant knew that this acts or omissions were unlawful. (emphasis added).

The emphasized phrase "as to money laundering" distinguishes the latter instruction from the one given in Stein. In Stein, the court reasoned that the "knowingly" instruction purported to apply to both the object of the conspiracy and to the money laundering act itself. The added phrase "as to money laundering" made sufficiently clear that the corresponding sentence applied only to the crime itself.

Moreover, the court gave the following additional instruction not given in Stein:

> The term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the defendant knew that the property involved in the transaction represented proceeds from some form, though not

necessarily which form of activity that constitutes a felony under federal or state law. Drug trafficking is a felony under federal or state law.

Combined, these differences distinguish Stein. These differences directly address the possibility that the jury could have omitted the second element of money laundering and convicted without finding Knapp knew the money represented illegal drug proceeds.

C. Currency Reporting Counts

Next, Knapp attacks his convictions under 26 U.S.C. §§ 7206(1) & (2) for incorrectly completing the IRS Form 8300s.

1. Willfulness Definition.

Knapp argues that the following "willfulness" instruction given by the trial court was wrong:

> An act was done willfully, as that term is used in the preceding instruction [on filing a false form 8300], if a defendant acted voluntarily and intentionally to violate a known legal duty or acted with a bad purpose or evil motive. Negligent conduct is not sufficient to constitute willfulness. (emphasis added).

Knapp argues that the highlighted phrase is incorrect. He cites United States v. Powell, 955 C.2d 1206 (9th Cir. 1991) purportedly as support. His argument fails.

Indeed, the Powell court noted that "[a]n instruction on willfulness need not include "bad faith" or "bad purpose. Neither bad purpose nor evil motive is an independent element of a willful failure to file under the statutory

requirement to file tax returns, 26 U.S.C. § 7203." 955 F.2d at 1210 (citations omitted). However, the court went on to hold: "[t]hus the government may prove willful conduct by establishing either: (1) that the defendant acted with a bad purpose or evil motive, or (2) that the defendant voluntary, intentionally violated a known legal duty." Id. at 1211 (emphasis in original). The court's instruction here tracks Powell verbatim, and, accordingly, we find no error.

2. Effect of United States v. Gaudin.

Next, Knapp asserts that pursuant to the recent Ninth Circuit en banc decision, United States v. Gaudin, 28 F.3d 943 (9th Cir. 1994), cert. granted, 115 S. Ct. 713 (Jan. 6, 1995) (No. 94-514), the trial court erred in treating the "materiality" element of the charges under 26 U.S.C. §§ 7206(1) & (2) as a question of law, rather than submitting it to the jury.

In Gaudin, the court held by a 6-5 margin that "materiality" is a question of fact in a charge under 18 U.S.C. § 1001. Gaudin upheld an earlier decision holding the same, United States v. Valdez, 594 F.2d 725, 728-29 (9th Cir. 1979). The Gaudin court reasoned that recent Supreme Court authority, beginning with In re Winship, 397 U.S. 358 (1970) and most recently in Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), has emphasized the constitutional requirement that the jury must find a defendant guilty beyond a reasonable doubt of each element of a crime with which the defendant is charged. Gaudin, 28 F.3d at 945-46.

Because Gaudin decided the materiality question under 18 U.S.C. § 1001, it does not control the question under 26 U.S.C. § 7206(1) & (2) at issue here. The controlling Ninth Circuit decision on the precise issue before the court is United States v. Flake, 746 F.2d 535 (9th Cir.

1984), cert. denied, 469 U.S. 1225 (1985).

In Flake, the appellant argued that because Valdez required materiality to be decided by a jury under § 1001, it must also do so under § 7206(1). The Flake court disagreed, adopting precedent directly on point from other circuits, and held that materiality is a question of law under 26 U.S.C. § 7206(1). 746 F.2d at 537. Gaudin notwithstanding, Flake is still good law. Gaudin did not overrule Flake, which is directly on point on the issue now before the court. Therefore, the trial court committed no error.

II. Alleged Sentencing Errors.

Knapp also challenges his sentence on several grounds.

A. Acceptance of Responsibility.

Despite a full jury trial, Knapp argued that he deserved a 3-point reduction in his sentence under Sentencing Guidelines § 3E1.1 for acceptance of responsibility because he cooperated fully in the grand jury investigation.

A district court's refusal to grant a reduction for acceptance of responsibility is a factual determination; the clearly erroneous standard applies. United States v. Innie, 7 F.3d 840, 847-48 (9th Cir. 1993), cert. denied, 114 S. Ct. 1567 (1994).

Knapp's presentence report stated that he did not demonstrate an acceptance of responsibility. After objections and a response, the trial court found that Knapp never admitted that he committed money laundering. There is

nothing in the record to leave a definite and firm conviction that this finding was wrong.

While the sentencing guidelines do not preclude a finding of acceptance of responsibility if a defendant proceeds to trial, such occasions are rare. U.S.S.G. § 3E1.1, Application Note 2. The government acknowledges that Knapp admitted he sold vehicles to Moreno, but points out that he has never admitted that he intended to launder money. To accept responsibility, one should admit the requisite criminal intent. United States v. Barron-Rivera, 922 F.2d 549, 552-53 (9th Cir. 1991). The district court committed no clear error here.

B. Refusal to Depart Downward.

Several of Knapp's arguments concern discretionary decisions of the court refusing to depart downward. The asserted grounds for departure included (1) aberrant behavior, (2) the offense was outside the heartland, and (3) extraordinary family or business circumstances. These arguments fail because a trial court's refusal to depart downward from the sentencing guidelines is not subject to appellate review. United States v. Cippollone, 951 F.2d 1057, 1058 (9th Cir. 1991). However, a court's determination that it has no authority to depart is a question of law which is reviewable. United States v. Cook, 938 F.2d 149, 152 (9th Cir. 1991).

The court determined it had no authority to depart downward for Knapp's rehabilitation from drug abuse prior to his arrest, relying on United States v. Martin, 938 F.2d 162, 163-64 (9th Cir. 1991), cert. denied, 112 S. Ct. 1679 (1992) (holding that U.S.S.G. §§ 5H1.3 and 5H1.4 precluded downward departures for rehabilitation from drug abuse). The Martin court reasoned that permitting such

departures would unfairly benefit defendants who have drug problems; such departures would not be available to defendants without drug problems. Although Martin involved post-arrest rehabilitation, the reasoning also applies here with pre-arrest rehabilitation. We find no error.

The court also determined it could not depart downward for Knapp's alleged diminished mental capacity. Knapp submitted evidence that he was suffering from something similar to a post-traumatic stress disorder resulting from the treatment he received while recovering from drug usage. U.S.S.G. § 5K2.13 allows a downward departure for diminished capacity if a defendant's non-violent offense was committed while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants. Assuming Knapp actually suffered diminished capacity as a result of detoxification, such diminished capacity was a direct and foreseeable result of his prior voluntary use of drugs. The court correctly found it could not depart downward in Knapp's case.[4]

Next, Knapp argues that the court erred when it did not comment on three of his proffered reasons for downward departure. Where the authority to depart is not in dispute and the court does not comment on the proffered grounds, this court may assume the trial court concluded downward departure was inappropriate. United States v. Garcia-Garcia, 927 F.2d 489, 491 (9th Cir. 1991) Thus, the trial court's

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[4]Knapp cites United States v. Cantu, 12 F.3d 1506 (9th Cir. 1993) in support. The court indicated that a defendant whose reduced capacity was caused in part by drug or alcohol abuse is not automatically disqualified from a downward departure. 12 F.3d at 1514 (emphasis in original). Here, the diminished capacity was caused entirely by abuse of drugs.

decision is not reviewable. Id.

C. Alleged Bias.

Knapp argues that the trial court misconstrued the record and demonstrated bias in sentencing him. This argument is without merit. Knapp cites some incidents where the court appeared to criticize Knapp for past drug use. Such comments do not require reversal, even if the court was ill-disposed towards Knapp. Liteky v. United States, 114 S. Ct. 1147 (1994) (a trial judge after completion of trial might be ill-disposed towards a defendant; such opinions are proper unless the court displays a deep-seated favoritism or antagonism that renders a fair judgment impossible). Finally, Knapp complains that the trial judge revealed during sentencing that he had represented automobile dealers when in private practice. This information is insignificant to show bias.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DAVID R. KNAPP, *Defendant-Appellant.*	]]]]]]]]]	No. 94-10022 D.C. No. CR-93-05019-OWW
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GRK CORPORATION, dba Knapp Ford/Mercury, *Defendant-Appellant.*	]]]]]]]]]	No. 94-10023 D.C. No. CR-93-05019-OWW ORDER

Filed August 22, 1997

Before: ALARCON and HALL, Circuit Judges, and King,* District Judge

*Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii sitting by designation.

The panel has voted to deny appellants' petition for rehearing. Judge Hall has voted to reject the suggestion for rehearing en banc. Judge Alarcon and Judge King have recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

I am employed in the County of Fresno, State of California. I am a citizen of the United States, over the age of 18 and not a party to the within action; my business address is: 2333 Merced Street, Fresno, California 93721.

On September 29, 1997, I served the foregoing document described as **PETITION FOR WRIT OF CERTIORARI** on the parties listed below in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

PAUL L. SEAVE
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KENNETH J. MELIKIAN
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I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Fresno, California.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Dated September 29, 1997, at Fresno, California.

/s/
LISA HOKE